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No. 04- ____

In the Supreme Court of the United States

AMERICAN COLLECTIONS ENTERPRISE, INC.
Cross-Petitioner,

v.

POOJA GOSWAMI, Individually
and on behalf of all others similarly situated,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court of Appeals has ruled that an offer given by a debt collector to settle a debtor's uncontested debt for a reduced amount constitutes a violation of the federal Fair Debt Collection Practices Act ("FDCPA" or "Act") where the offer does not accurately reflect the authority given the debt collector by the creditor. The Court of Appeals' ruling is contrary to the purpose of the FDCPA, is contrary to rulings of other Circuits and is an absurd result of improper statutory interpretation. For the reasons stated in this Cross-Petition, this Court should review the following questions:

1) Whether Courts should interpret the Fair Debt Collection Practices Act in accordance with its purpose, as stated in 15 USC §1692, to avoid finding violations of Act provisions where there has been no abusive or coercive measures taken in the collection of a debt?

2) Whether Courts should look beyond the collector's communication with a debtor to include the terms of an agreement between a creditor and a debt collector when determining whether a collector has violated 15 USC §1692e(10) of the Fair Debt Collection Practices Act?

PARTIES TO THE PROCEEDING

Cross-Petitioner is American Collections Enterprise, Inc.

Respondent is Pooja Goswami.

RULE 29.6 STATEMENT

Cross-Petitioner agrees with the Rule 29.6 statement of Petitioner.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rules 12.5 and 13.4 of this Court's rules, Cross-Petitioner, American Collections Enterprise, Inc., respectfully requests that, if the Court grants the petition for writ of certiorari in the instant matter, then the Court should issue a writ of certiorari to review the judgment of the Court of Appeals on the questions presented in this conditional cross-petition.

OPINION AND ORDER BELOW

The Cross-Petitioners incorporate by reference the "Opinions Below" section of Petitioner's Petition for Writ of Certiorari.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on July 28, 2004. A Petition for Rehearing was denied on December 22, 2004. The Goswami Petition for Writ of Certiorari was filed on March 22, 2005, and the response date is set for April 25, 2005. The Court has jurisdiction over this Cross-Petition under 28 USC § 1254(1) and Rules 12.5 and 13.4 of this Court.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions involved are 15 USC §§ 1692 and 1692e. (App. A at 1b-4b).

STATEMENT OF THE CASE

Pooja Goswami sued American Collections Enterprise, Inc. ("ACEI") claiming that an offer of settlement in the letter from ACEI violated her rights under Section 1692e(10) of the FDCPA. The letter offered a 30% discount off her uncontested debt if she accepted the offer within 30 days. There was no contention that the offer was in any way unavailable as written, and Goswami never contacted ACEI to either accept or reject the offer. Goswami argued that the creditor, in this case Capital One, had authorized ACEI to settle her Visa debt with a greater discount, which was available for a longer period of time, and, therefore, an offer less than the amount authorized was deceptive and a violation of Goswami's rights under the FDCPA.

The District Court held in favor of ACEI after a hearing on a motion for summary judgment, stating that the agreement between ACEI and Capital One should not be considered in determining a violation under section 1692e(10). The District Court held,

> [Goswami] is not a party to the [ACEI]-Capital One contract, nor is she a beneficiary of it. Goswami understands the statute to require an agent to disclose its principal's confidential instructions about levels of compromise. If her position were correct, collection agencies -- and negotiations to settle debts -- would be eliminated entirely. A negotiating position is not exactly a fact; it is a contingent fact, binding as fact only if it is accepted. Bidding low is not deceitful. The letter was an offer -- a negotiating position. The law does not bar [ACEI] from offering to settle the debt at a thirty percent discount with no questions asked for thirty days. Under the statute, [ACEI's]

> statements may be false if it intended when it sent the letter to reject Goswami's payment, or if it actually rejected her payment after she accepted the offer. Goswami did not accept the offer, so she cannot claim the latter; she has no proof of the former.[1]

Goswami appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals reversed the judgment of the District Court with respect to whether the settlement offer violated 15 USC § 1692e(10).[2] Although the Fifth Circuit recognized that offers of settlement are favored under the FDCPA[3], the Court ultimately concluded that the offer in this case was a violation of section 1692e(10) because the offer did not accurately reflect the creditor's discount authority. In so holding the Fifth Circuit stated,

> ACEI made false or misleading statements about the settlement authority it held from Capital One both in the discount it was authorized to offer and the time within which Goswami was allowed to accept the offer. ACEI's deception is actionable under the FDCPA and is not excused because it is part of a debt collector's settlement offer.[4]

The Fifth Circuit cited *Lewis v. ACB Business Services, Inc.*, 135 F.3d 839 (6th Cir. 1998), for the proposition that settlement agreements are favored but implicitly ignored the Sixth Circuit's ruling that the agreement between the debt

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[1] *Goswami v. American Collections Enterprise, Inc.*, 280 F. Supp. 2d 624, 627 (S.D. Tex. 2003).
[2] *Goswami v. American Collections Enterprise, Inc.*, 377 F.3d 488, 496 (5th Cir. 2004).
[3] 377 F.3d at 495-96.
[4] 377 F.3d at 496.

collector and creditor is not relevant in determining whether the FDCPA has been violated.

ACEI petitioned the panel for rehearing asserting the argument that an offer presented by a collector which provided a no-strings-attached benefit to the debtor is not the type of "abusive" behavior that Congress intended to prevent as stated in 15 USC § 1692. The panel denied rehearing without reason on December 22, 2004.

REASONS FOR GRANTING THE CROSS-PETITION

This Cross-Petition for writ of certiorari should be granted for the following reasons: Initially, there is a conflict of decisions between the Circuit Courts of Appeal on the issues of whether non-coercive settlement offers violate the FDCPA and whether an underlying agreement for collection of bad debts between a creditor and a collector should be considered in determining FDCPA liability of the debt collector; secondly, the Court of Appeals has so departed from the accepted and usual course of statutory construction as to require this Court to exercise its supervisory power to correct it; thirdly, by deciding that a collector's offer of settlement of an uncontested debt violates the FDCPA even if the offer stated is within authorized parameters, the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

I. There Is a Conflict of Decisions Between the Courts of Appeals for the Fifth and Sixth Circuits on the Issues of Whether a Debt Collector Violates the Fair Debt Collection Practices Act by Making a Noncoercive Settlement Offer of the Debt in a Reduced Amount, But Which Does Not Reflect the Creditor's Most Beneficial Settlement Terms Possible

The Sixth Circuit Court of Appeals' opinion in *Lewis v. ACB Business Services, Inc.*, 135 F.3d 839 (6th Cir. 1998), is in conflict with the Fifth Circuit Court of Appeals' opinion below in *Goswami v. American Collections Enterprise, Inc.*, 377 F.3d 488 (5th Cir. 2004).

A. The Sixth Circuit's Opinion in *Lewis v. ACB Business Services, Inc.*

In *Lewis v. ACB Business Services, Inc.*, the Court of Appeals for the Sixth Circuit decided that where the language of the FDCPA is broader than the declared purpose, the Courts should look to the reason for the legislation for proper interpretation. The Sixth Circuit found that noncoercive settlement offers are favored under the FDCPA and sections of the Act that would tend to prohibit such a benefit to the debtor are in direct variance with the Act's purpose. Unlike the Fifth Circuit, the Sixth Circuit also discussed that the collection agreement between the creditor and the collector was not relevant to consideration of FDCPA violations committed by the collector in its efforts to recover the debt owed by the debtor.

In *Lewis* the Court addressed the questions of whether a letter offering a payment arrangement to a debtor and a phone call placed to debtor, after a cease communications letter was received by the collector violated 15 USC § 1692c(c)(2).

Section 1692c(c)(2) interpreted by the Sixth Circuit in *Lewis*, is similar to Section 1692e(10) interpreted by the Fifth Circuit in *Goswami*, in that the broad language of both sections of the Act may prohibit collection activity which is not abusive. The Sixth Circuit in deciding that a technical violation of the Act cannot be supported in light of its purpose reasoned that punishing debt collectors for initiating settlement opportunities does not further the interest of the consumer that the FDCPA was designed to protect, as follows:

> While Congress appears to have intended the act to eliminate abusive collection practices, the language of § 1692c(c) is broader: it not only states that a debt collector may not make a demand for payment following a cease-communication letter, but also prohibits communication of any kind other than those falling within the three exceptions. Thus, at first glance, ACB's June 3rd letter does not appear to fall within the literal terms of § 1692c(c)(2) as a notice of remedy. A close look at the letter, however, shows that the letter can be construed as a type of settlement offer and that ACB normally invokes such a remedy. We believe that such a construction is warranted.
>
> We believe that Lewis's interpretation of § 1692c(c)(2), which would prohibit collectors from sending noncoercive settlement offers as a remedy, is 'plainly at variance with the policy of the legislation as a whole.' *United States v. American Trucking Ass'ns,* 310 U.S. 534, 543, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345 (1940). To hold that a debt collector cannot offer payment options as part of an effort to resolve an outstanding debt, possibly without litigation, would force honest debt collectors seeking a peaceful resolution of the debt to file suit in order to advance

> efforts to resolve the —debt – something that is clearly at odds with the language and purpose of the FDCPA. Nothing ACB did in its June 3rd letter can be construed as an abusive collection practice. It simply offered to settle Lewis's debt without litigation. Allowing debt collectors to send such a letter is not only consistent with the Act but also may result in resolution of the debt without resorting to litigation, saving all parties involved the needless cost and delay of litigation as is exemplified by this very case. And it is certainly less coercive and more protective of the interests of the debtor. Moreover, while ACB's letter could have more clearly expressed its character as a notice of a normally invoked remedy had it included other typically invoked remedies, such as filing a lawsuit, nothing in the statute requires that the letter give notice of all of the remedies normally invoked by debt collectors, and the statute does not require that a debt collector invoke any specific type of remedy. Rather, it allows the debt collector to notify the consumer of remedies *it* normally invokes. The record in this case clearly demonstrates that ACB did just that.[5]

The Sixth Circuit determined that it would not construe the FDCPA to punish non-coercive and non-abusive collection efforts that ultimately are a benefit to the debtor. The debtor in the case below was offered a settlement which was a discount on her uncontested debt. Under the reasoning of *Lewis v. ACB*, Cross Petitioner should not be penalized.

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[5] *Lewis* at 398-399.

Further at odds with the Fifth Circuit, the debtor plaintiff in *Lewis* argued that he should be entitled to discover the contract between ACB and American Express, the creditor, because it controlled ACB's collection activities and could lead to discovery of collection activities required of ACB but not followed. The Sixth Circuit affirmed the District Court, holding that the contract between AMEX and ACB would not be discoverable as follows:

> We also do not believe that the district court abused its discretion in finding that the [contract between the creditor and the debt collector] was not relevant to any of the issues remaining in the case. For one thing, Lewis never disputed that he owed the debt. And there was never any dispute that ACB had sent the [collection] letter. Thus, questions of whether ACB sent Lewis the letter pursuant to a contract with Amex or whether ACB acted outside the terms of any contract it may have had with Amex had no relevance to whether ACB's activities at issue in the Dayton case were a violation of the FDCPA or the OCSPA. Likewise, the statements made by employees of ACB at trial mentioning an agreement between ACB and Amex were simply made in passing and did not make the contract relevant to the issues in the Dayton case. These statements simply explained why Lewis's file was again sent to ACB after the suit was filed. Thus, the district court's denial of Lewis's motion to compel production of the contract between ACB and Amex was not an abuse of discretion.[6]

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[6] *Lewis* at 402-403 (footnote omitted).

Although the Sixth Circuit was interpreting a different section of the FDCPA than was considered by the Fifth Circuit in the case below, the Sixth Circuit did not look beyond the communications between collector and debtor to determine whether a violation of the FDCPA occurred. The determination of whether the settlement offer violates any provisions of the FDCPA must be limited to viewing the letter as a whole and without any considerations outside the four corners of the letter making the offer itself. In accordance with the Sixth Circuit, the settlement authority in a contract between ACEI and Capital One is not relevant to whether the correspondence violates the FDCPA.

B. The Fifth Circuit's Opinion in the Case Below

The Fifth Circuit held that an offer made by a collector on behalf of a creditor to settle an uncontested debt is a violation of the FDCPA if "[the collector] made false or misleading statements about the settlement authority it held from [the creditor] in the discount it was authorized to offer and the time within which [the debtor] was allowed to accept the offer." This broad pronouncement is in conflict with the Sixth Circuit's decision that the FDCPA must be construed in light of its purpose and that the underlying agreement between the creditor and the collector is not relevant.

The Fifth Circuit's decision is inconsistent with the Sixth Circuit's view that Congress intended the FDCPA to prevent only abusive collection practices. The Sixth Circuit interpreted section 1692c(c)(2) of the FDCPA in accordance with the purpose of the FDCPA as identified in section 1692, to restrict the broader language of section 1692c(c)(2) to acts which are abusive. By doing so the Sixth Circuit ruled that a "noncoercive settlement offer" would not violate the FDCPA. This ruling conflicts with the Fifth Circuit in that

the Fifth Circuit held that an offer to settle a debt, albeit available as stated but which does not reflect the creditor's authority, is a violation.

The Sixth Circuit's inclusion of the coercive or abusive element in determining whether a settlement offer violates the FDCPA is in accordance with the purpose of the FDCPA and in conflict with the Fifth Circuit's opinion below. Because of the conflicting opinions of the Circuit Courts of Appeals regarding proper interpretation of the text of the FDCPA and whether to consider the underlying agreement between creditor and collector in identifying possible violations of the FDCPA, this Court should grant this Cross-Petition for certiorari and resolve the conflict.

II. The Court of Appeals, by Not Interpreting the Language of 15 USC § 1692e(10) in Accordance with the Purpose of the Legislation as Required by this Court in *United States v. American Trucking Ass'ns* Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Supervisory Powers

The Court of Appeals, by interpreting the FDCPA in a manner inconsistent with the clear purpose of the Act, has so far departed from the accepted and usual course of statutory construction that this Court should exercise its supervisory power to correct the error. The FDCPA was adopted to stop unscrupulous collectors from abusing debtors in the process of collecting debts. The purpose of the FDCPA is expressly described in the Act as follows:

(a) ***Abusive practices***

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. ***Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy***.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or ***other abusive debt collection practices*** are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate ***abusive debt collection practices by debt collectors***, to insure that those debt collectors who refrain from using abusive debt collection practices are not

> competitively disadvantaged, and to promote consistent State action to ***protect consumers against debt collection abuses.***

15 U.S.C. § 1692 (emphasis added).

A collector's letter that offers a benefit by reducing the amount owed is not abusive and does not rise to the level of deception necessary to support a violation of the FDCPA.

The Ninth Circuit in *Pressley v. Capital Credit & Collection Service, Inc.*, construed a technical violation of section 1692e(11) where a collector sent a follow up letter to a debtor asking for the same payment as previously requested. The Ninth Circuit recognized that in interpreting the language of the FDCPA, it is necessary to look to the purpose of the Act to determine if collection efforts that result in a technical violation of the statute are the type of collection efforts intended to be prohibited, stating as follows:

> In interpreting statutes, the Supreme Court has often recognized the rule 'that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' *E.g., United Steelworkers of America v. Weber,* 443 U.S. 193, 201, 99 S.Ct. 2721, 2726, 61 L.Ed.2d 480 (1979) (quoting *Holy Trinity Church v. United States,* 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)).
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> ...
>
> The purpose of the Act as explained by Senator Riegle (Michigan) 'is to protect consumers from a host of unfair, harassing, and deceptive debt collection

> practices without imposing unnecessary restrictions on ethical debt collectors.' 123 Cong.Rec.S. 27,386 (daily ed. Aug. 5, 1977). This stated purpose as set forth in the Committee Report was ordered printed in the Record. *Id.* at 27,387.
>
> In this case, we deal with a follow up notice which only demands a payment as earlier requested. Applying Pressley's interpretation, requiring the debt collector to make affirmative disclosures in this narrow type of follow up notice, would ignore the balancing mandated by Congress. We therefore hold that the follow up notice sent in this case is not a 'communication' within which the disclosure required by 15 U.S.C. § 1692e(11) must be made.

760 F.2d 922, 924-925 (9th Cir. 1985).

Similarly, as discussed above, the Sixth Circuit in *Lewis,* held that a demand letter offering settlement should not be construed as violating the FDCPA when the purpose of the Act is read in conjunction with the specific section alleged to have been technically violated:

> While Congress appears to have intended the act to eliminate abusive collection practices, the language of § 1692c(c) is broader: it not only states that a debt collector may not make a demand for payment following a cease-communication letter, but also prohibits communication of any kind other than those falling within the three exceptions.
> ...
>
> We believe that Lewis's interpretation of § 1692c(c)(2), which would prohibit collectors from

> sending noncoercive settlement offers as a remedy, is "plainly at variance with the policy of the legislation as a whole." *United States v. American Trucking Ass'ns,* 310 U.S. 534, 543, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345 (1940).[7]

The objective of the FDCPA, as stated in the statute itself, is to stop abusive practices that "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). These examples of the negative societal impact of collection abuse should, without argument, be prevented. However, applying an interpretation to section 1692e(10) that does not take into consideration the Congressional purpose results in the Fifth Circuit's disapproval of collection efforts that benefit the debtor. This cannot be a proper interpretation.

The Fifth Circuit should follow this Court's mandate that when strict adherence to the words of a statute leads "to absurd or futile results," the Court should "look[ ] beyond the words to the purpose of the act." *United States v. American Trucking Ass'ns,* 310 U.S. 534, 543, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345 (1940). Even "when the plain meaning [does] not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,'" the Court should "follow[ ] the purpose rather than the literal words." *Id.* Because the Fifth Circuit has interpreted section 1692e(10) in a manner inconsistent with this Court's mandate, inconsistent with the Sixth and Ninth Circuits, and inconsistent with the declared purpose of the Act

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[7] *Lewis* at 398-399.

itself, this Court should use its supervisory power to correct the Court of Appeals below.

III. The Court of Appeals, by Deciding That a Debt Collector Is Exposed to Penalties under 15 USC § 1692e(10) by Making a Settlement Offer of Less Than Full Authority Given by the Creditor to Resolve the Outstanding Debt, Has Decided an Important Question of Federal Law That Has Not Been, but Should Be, Settled by this Court

The Court of Appeals, by deciding that a collector is exposed to damages under the FDCPA by offering to resolve a debt for a discount for a limited period of time where the offer does not reflect the full authority given by a creditor, has decided an important question of federal law that has not been, but should be, decided by this Court.

A. The Court of Appeals Decision will Affect Interpretations of Other Provisions of the FDCPA

The FDCPA must be interpreted consistent with the purpose for which it was enacted, to "*eliminate abusive debt collection practices by debt collectors.*" 15 USC § 1692(e) Because of the attorney fee switching provisions of the FDCPA, consumer attorneys have created a cottage industry of filing suits loosely based on hypertechnical violations of the Act resulting from debt collector actions that are in no way abusive or coercive. The present case is no exception. The violation of cross petitioner was to offer a 30 percent discount available for 30 days on an uncontested debt when the creditor had authorized an even greater benefit. Now, according to Fifth Circuit interpretation of the FDCPA, ACEI is liable to Goswami for any actual damages, additional

damages and attorney fees she may be able to prove.[8] This interpretation distorts the purpose of the Act and such distortion will continue if not corrected by this Court.

Other areas of the Act state general prohibitory language that appear to go beyond the purpose of the Act. As the Sixth Circuit noted in *Lewis,* "While Congress appears to have intended the act to eliminate abusive collection practices, the language of section 1692c(c) is broader." However, unlike the Fifth Circuit, the Sixth Circuit properly looked to the purpose of the Act to determine that it is not in the best interest of the debtor, nor is it the purpose of the FDCPA, to punish offers that may lead to settlement as long as such offers are not coercive. In the case below, there were no penalties or negative repercussions in any way attributed to Goswami's decision not to accept the offer to discount her debt. The offer was without question available as stated, Goswami's decision not to accept it only put her back in the position where she started, namely owing the full amount.

If the Court does not settle the issue of whether provisions of the FDCPA should be interpreted in accordance with the purpose of the Act, then lower courts may continue to permit vexatious litigation resulting from actions that are not harmful, but only potentially a technical violation. The collection industry, although much maligned, is an important industry to the millions of businesses who suffer losses from bad check writers and the like. The collectors' activities are already controlled by both federal and state statutes designed to prevent abuses. Improperly expanding the purpose of the FDCPA to include collection activity which does not improperly threaten, abuse or cause harm unnecessarily

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[8] 15 USC § 1692k (civil liability).

restricts the ability of collectors to help creditors recover legitimate debts. Such interpretation does nothing to further the purpose of the Act, only frustrate it.

B. The Fifth Circuit's Broad Pronouncement Invades Attorney-Client Relationships

This Court has specifically held that the FDCPA applies to attorneys involved in litigation.[9] Therefore attorneys who practice in the Fifth Circuit must not make "false or misleading statements about the settlement authority [he] held from [the creditor] in the discount [he] was authorized to offer and the time within which [the debtor] was allowed to accept the offer."[10] Any attorney engaged in negotiation and who does not disclose his client's full authority runs the risk that he will be in violation of the FDCPA. An attorney must be a zealous advocate for a client and not continue cases where such zealous advocacy is compromised by a conflict of interest. The client will not be best served by an attorney who fears personal liability if a comment the attorney makes during negotiations about the settlement value of the case is construed as a misrepresentation of authority. According to the Fifth Circuit, to be sure to avoid a violation of the FDCPA the attorney should provide the client's highest and best offer immediately, otherwise run the risk that negotiation strategy will be construed as deceptive under 15 U.S.C. § 1692e(10). Such an approach would run contrary to the attorney's obligation to get the best result for the client.

It would not be unusual for an attorney in mediation or on the phone with opposing counsel, to suggest in making an

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[9] *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489 (1995).
[10] 377 F.3d at 496.

offer of settlement on his client's behalf "I think this is all we can do". Although the attorney may be posturing to get the greatest advantage for his client, if in fact the attorney knows the bottom line offer had not been made, this comment would be an FDCPA violation in the Fifth Circuit. The District Judge in this case recognized that ACEI was involved in negotiation and described the potentially absurd result of the Fifth Circuit's overbroad conclusion as follows: "If [Goswami's] position were correct, collection agencies -- and negotiations to settle debts – would be eliminated entirely. A negotiating position is not exactly a fact; it is a contingent fact, binding as fact only if it is accepted. Bidding low is not deceitful."[11] Since attorneys in litigation are debt collectors under *Heintz v. Jenkins*, then the Fifth Circuit has interpreted the FDCPA to create a conflict between attorneys and clients that cannot stand.

The undisputed facts of this case are that ACEI offered a reduction in Goswami's undisputed debt by 30% with a 30-day period during which no interest would accrue on her Visa. To interpret the FDCPA to suggest that this type collection activity is a violation exposes complying debt collectors for liability, damages and attorney's fees in lawsuits involving unrealistic or peculiar interpretations of collection letters. That goal was not intended by Congress and this Court should grant the Cross-Petition for writ to correct the incorrect statutory interpretation in this case which does not further the purpose of the Act.

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[11] 280 F. Supp. at 627

CONCLUSION

For the reasons stated above, Cross-Petitioner requests that the Court grant its Cross-Petition for Writ of Certiorari.

Respectfully Submitted,

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APPENDIX A

TITLE 15. COMMERCE AND TRADE
CHAPTER 41. CONSUMER CREDIT PROTECTION
DEBT COLLECTION PRACTICES

15 USC § 1692

§ 1692. Congressional findings and declaration of purpose

(a) Abusive practices. There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws. Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods. Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce. Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes. It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 USC § 1692e

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of--

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to--

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this.

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IN THE

Supreme Court of the United States

AMERICAN COLLECTIONS ENTERPRISE, INC., PETITIONER

v.

POOJA GOSWAMI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether courts should ignore conduct that is in violation of specific provisions of the Fair Debt Collection Practices Act and find no violation if the conduct does not rise to a level that the court considers to be "abusive?"

2. Whether courts may look beyond the debt collectors' written communication with the debtor to other evidence in determining whether the language and the written communication constitutes use of a false representation or deceptive means to collect a debt, in violation of 15 U.S.C. § 1692e(10)?

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INTRODUCTION

Not only is there no conflict in the circuits on the questions presented, there is no other reason for this Court to grant a petition for certiorari on the issues presented by the Petitioner. First, the only grounds that the Petitioner cites in support of its argument that there is a conflict among the circuits is what it perceives to be a conflict between the Sixth Circuit's opinion in *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389 (6th Cir. 1998) and the Fifth Circuit's opinion below in *Goswami v. American Collections Enterprise, Inc.*, 377 F.3d 488 (5th Cir. 2004). *Lewis* involved the question of whether a settlement letter constituted an exception under § 1692c(c) to the prohibition against a debt collector's communication with a debtor after the debtor sends the debt collector a "cease communications" or "cease and desist" letter to the collector. *Goswami* involved the question whether the settlement letter used false representations or deceptive means to collect a debt in violation of 15 U.S.C. § 1692e(10). There was no issue in the Sixth Circuit's opinion in *Lewis* that the settlement letter used false representations or deceptive means in violation of § 1692e(10). Thus, there can be no conflict among the circuits represented by these opinions.

There is no important issue of federal law for this Court to settle and no departure from the usual course of judicial proceedings for this Court to correct. The summary judgment record in the Court of Appeals below clearly showed that the Petitioner's settlement letter used false representations and deceptive means and thus was in violation of § 1692e(10). The letter represented to Goswami:

> Effective immediately and only during the next thirty days, will our client agree to settle your outstanding balance due with a thirty (30%) percent discount off your above balance owed.
>
> This settlement amount must be in one payment and must be received in our office no later than 30 days from the date of this letter unless you contact our office to make other arrangements.

(See Appendix A). Despite the representation that Petitioner's client would only agree to settle during the next 30 days at a 30% discount, the summary judgment evidence showed that Petitioner had its client's approval to settle at any time at a 50% discount. The letter used false representations and was deceptive.

Petitioner's warning that the Court of Appeals' ruling in *Goswami* will end the ability of all collection agencies and attorneys to negotiate settlements of consumer debts is absurd. The only effect that the Court of Appeals' opinion will have is to stop debt collectors from making false representations in connection with settlement communications. If collectors wish to make a 30% settlement offer instead of a 50% settlement offer, they will still be able to do so. The only thing that they will not be able to do is to affirmatively misrepresent the extent of their authority or falsely represent the time within which a settlement offer must be accepted.

REASONS FOR DENYING THE PETITION

This Court should deny Petitioner's petition for writ of certiorari. First, the decision below does not conflict with the decision of this Court or any court of appeals. The opinion of the Court of Appeals below does not in any way depart from the accepted and usual course of statutory construction. The Court of Appeals did not need to construe § 1692e(10). It applied the summary judgment evidence to the statute and reached a result that was not absurd and not unreasonable. Finally, the Court of Appeals did not decide any important question of federal law that needs to be settled by this Court. The Court of Appeals looked at the summary judgment evidence and found that the collection letter contained false representations in violation of § 1692e(10). This is not an important issue of federal law that needs to be settled by this Court.

I. There is No Conflict Between the Circuit Courts of Appeals on the Questions Presented.

First and foremost, there cannot be a conflict between the Fifth and Sixth Circuits on the questions presented, because the Sixth Circuit case cited by Petitioner, *Lewis v. ACB Business Services, Inc*, 135 F.3d 389 (6th Cir. 1998) was decided under § 1692c(c)(2) and not under § 1692e(10). Nevertheless, the Petitioner asserts that the Sixth Circuit Court of Appeals' opinion in *Lewis* differs from the Court of Appeals' opinion below in three basic ways: (1) *Lewis* holds that any section of the FDCPA that would prohibit non-coercive settlement offers would be in direct variance with the FDCPA's purpose and the Court of Appeals below

applied § 1692e(10) to prohibit a non-coercive settlement letter; (2) *Lewis* holds that a court cannot consider a collection contract in determining whether a communication by a debt collector constituted a violation of the FDCPA and the Court of Appeals below considered Petitioner's collection contract; and (3) *Lewis* holds that a court must look only at the written collection communication involved in determining whether its language violates a provision of the FDCPA and the Court of Appeals below looked at other evidence besides the collection letter. Petition is wrong on each of its assertions.

A. *Lewis v. ACB Collection Services, Inc.* Does Not Hold That a Non-coercive Settlement Letter Cannot Violate the FDCPA.

The Petitioner grossly misstates the holding in *Lewis*. Nowhere in *Lewis* did the Sixth Circuit hold that the language of a settlement letter could not violate the FDCPA. The court in *Lewis* held only that the settlement letter fell within the "notice of remedy" exception of § 1692c(c)(2). In *Lewis*, the debt collector had received a letter from the debtor instructing it to cease all communications. *Lewis*, 135 F.3d at 395. Under the provisions of § 1692c, a debt collector must cease all communication with the debtor after receiving such a written communication, except that the debt collector may send the debtor a notice informing her that the debt collector or creditor may invoke special remedies that are ordinarily invoked. 15 U.S.C. § 1692c(c)(2). The Court held that the settlement letter that the debt collector sent to the debtor constituted such a "notice of remedy" under § 1692c(c)(2) and was

therefore not a forbidden communication following a cease and desist letter. *Lewis*, 135 F.3d at 398. There is no conflict between the decisions of the Court of Appeals below and the Sixth Circuit.

B. *Lewis v. ABC Collection Services, Inc.* Does Not Hold That a Collection Contract is Not Relevant to Whether a Collection Letter Contains False Representations.

Lewis does not stand for the proposition that the debt collector's contract with its creditor/client could not be considered in determining whether representations in a collection letter were false or deceptive. The Sixth Circuit's discussion of collection contracts in *Lewis* was limited to reviewing the district court's decision to deny a motion to compel production of a collection contract in discovery. The Sixth Circuit affirmed the trial court agreeing that the collection contract was not relevant to any of the issues being litigated in that case. In *Lewis*, there were no contentions that the settlement letter at issue involved false representations or deceptive statements of any kind, as there were in this case below. Thus, there is no conflict between the decisions of the Court of Appeals below and the Sixth Circuit.

C. *Lewis v. ABC Collection Services, Inc.* Does Not Hold That Courts Must Look at Collection Letter Only to Determine if its Representations are False.

Lewis does not stand for the proposition that a court must look only at the four corners of the collection letter itself to determine if that letter contains false representations or deceptive means within it. In fact, in the part of the opinion in *Lewis* that actually dealt with § 1692e(10), the Court specifically looked to evidence outside of the collection letter itself. In *Lewis*, the debtor claimed that ACB's use of the alias name "M. Hall" at the bottom of its letter was a false representation and a deceptive means of collecting the debt. 135 F.3d at 400. The court discussed the evidence of ACB's actual collection practices related to use of an alias name on the letter under § 1692e(10) and concluded "it is clear from the record that Lewis's account actually received personal attention, and that the letter was in no other respect deceptive." *Lewis*, 135 F.3d at 401.

A court cannot determine whether the language of a collection letter contains false representations or deceptive means unless the court is able to compare the representations in the letter to the collector's authority, acts or practices. The case at hand is a perfect example of this. There is simply no way to determine whether or not the Petitioner's statements in the settlement letter are true or false without looking at the summary judgment evidence of what the Petitioner's settlement authority was. This is exactly what the Court of Appeals below did. The summary judgment evidence

showed that (a) Petitioner had pre-approved authority from its creditor to offer settlement of the debt at 50% of the face amount of the debt and (b) Petitioner could offer this settlement rate at any time that Petitioner had the account for collection.

There is no conflict between the Sixth Circuit and the Fifth Circuit Court of Appeals' opinions, and this Court should deny the Petitioner's petition for the writ of certiorari.

II. The Court of Appeals Did Not Depart From the Accepted and Usual Course of Judicial Proceedings.

The Court of Appeals did not depart from the accepted and usual course of judicial proceedings and there is no need for this Court to exercise its supervisory powers. The Court of Appeals below merely held that the language in Petitioner's collection letter contained false representations and deceptive means as a matter of law under § 1692e(10). The summary judgment evidence in the record clearly showed that this was the case. There is no reason for this Court to exercise jurisdiction, because the Court of Appeals below acted properly.

A. The Court of Appeals' Application of § 1692e(10) Did Not Lead to Absurd or Unreasonable Result, and Looking to the FDCPA's "Purpose" Was Not Necessary.

The Petitioner claims that the rules of statutory construction set out in *United States v. American Trucking Associations*, 310 U.S. 534, 543, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345 (1940), required the Court of Appeals to follow the "purpose" of § 1692e(10) rather than the literal words of that section, where application of that statute produced an unreasonable result plainly at variance with the policy of the legislation as a whole. Petitioner contends that the policy of the FDCPA as a whole is to stop abusive debt collection practices. Petitioner further contends that the Court of Appeals' determination that its settlement letter violated § 1692e(10) was an absurd result or at least was an unreasonable result that was plainly at variance with the policy of stopping abusive debt collection practices. Petitioner therefore asserts that the Court of Appeals should have followed the "purpose" of the FDCPA rather than following the literal words of § 1692e(10).

Petitioner's argument is an absurd one. The Court of Appeals' adherence to the words of § 1692e(10) did not create an absurd or futile result and did not create an unreasonable result at variance with the policy of the FDCPA. The settlement letter contained false representations about Petitioner's settlement authority. The Court of Appeals' application of § 1692e(10) did not create an absurd result, and so it did not need to "look to the purpose" of that section.

B. Prohibiting False Representations in Settlement Letters is Consistent With the Purposes of the FDCPA.

False representations in collection communications is one type of abusive practice that Congress intended to stop by including § 1692e(10) in the FDCPA. The Sixth Circuit in *Lewis* recognized this in stating:

> Congress intended the Act to eliminate unfair debt-collection practices, such as late-night telephone calls, **false representations,** and embarrassing communications.

Lewis v. ACB Business Services, Inc., 135 F.3d 389, 398 (6th Cir. 1998)(emphasis added). The Sixth Circuit in Lewis specifically recognized section 1692e(10) as prohibiting false representations.

> **The FDCPA prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e.** Section 1692e is broken into sixteen subsections, which provide a non-exhaustive list of prohibited practices. **Subsection 1692e(10), at issue in this case, specifically prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt** or to obtain information concerning a consumer."

Lewis v. ACB Business Services, Inc., 135 F.3d 389, 400 (6th Cir. 1998)(emphasis added). Had the Court of Appeals below addressed the "purpose" of § 1692e(10), it would have found its application of § 1692e(10) to the Petitioner's settlement letter fit within the purpose of that section – to prohibit false, deceptive, or misleading representations in connection with collection of the debt.

C. *Presley v. Capital Credit Collection Services, Inc. and Lewis v. ABC Collection Services, Inc.* Do Not Hold That Only "Very Abusive" Conduct is Actionable.

The Petitioner urges this Court to adopt a new rule that would lead to a new and frightening era of judicial legislation under the FDCPA. Petitioner asks this Court to rule that violations of the express language of provisions of the FDCPA are not violations unless they are "very bad", or "very abusive." Such an approach would completely negate all of the language of the FDCPA and invite the district courts and the courts of appeals to judicially legislate what they believe to be violations based on what they perceive to be "very abusive."

Petitioner asserts that both the Sixth Circuit's decision in *Lewis* and the Ninth Circuit's decision in *Pressley v. Capital Credit & Collection Services, Inc.* 760 F.2d 922 (9th Cir. 1985) support this argument. Petitioner argues that in *Pressley* the Ninth Circuit held that conduct that violates the letter of the law but not the spirit of the law is not actionable as a violation. This completely mischaracterizes the Ninth Circuit's

holding in *Pressley*. The Ninth Circuit held that a second notice letter sent by a debt collector that did not contain the "Mini-Miranda" was not a "communication" within which the disclosure required by § 1692e(11) must be made. *Pressley v. Capital Credit & Collection Services, Inc.*, 760 F.2d at 925.

Similarly, Petitioner asserts that *Lewis* stands for the proposition that collection conduct must violate the spirit of the FDCPA to constitute a violation. This is a complete mischaracterization of the Court's holding in *Lewis*. The court in *Lewis* did not find a "technical violation" that it ignored as not abusive. Rather, it found that the debt collector's letter at issue did not violate the FDCPA because it constituted a "notice of remedy" under § 1692c(c)(2). *Lewis*, 135 F.3d at 399.

The Court of Appeals below did not depart from the accepted and usual course of judicial proceedings. The Court of Appeals found that the Petitioner's settlement letter contained false representations and that it was a deceptive means of collecting a debt. This was not an absurd result or even an unreasonable one and thus the Court of Appeals did not need to look to the "purpose of the Act." Had the Court of Appeals looked at the "purpose of the Act," it would have found its decision fit squarely within the purpose of § 1692e(10). There is no reason for this Court to use its supervisory powers, because the Court of Appeals below acted properly. This Court should deny the Petitioner's petition for the writ of certiorari.

III. The Petition Should be Denied Because There is No Important Question of Federal Law to Be Settled by This Court.

Petitioner argues that the Court of Appeals' decision below will stop collection agencies and consumer collection attorneys from negotiating settlements of consumer debts. This grossly misstates both the Court of Appeals' decision below and the effect that the decision will have.

The Court of Appeals below did not in any way hold that a debt collector may not make a settlement offer or negotiate settlement of a consumer debt and its holding will not have that effect. The Court of Appeals below held only that Petitioner made false representations and used deceptive means in its settlement letter which violated § 1692e(10). More particularly, the Court of Appeals found that where Petitioner stated to the debtor in its settlement letter that the creditor would allow it to offer a discount of only 30% "only for the next thirty days," and where that representation was clearly false because the creditor had already authorized Petitioner to settle for up to a 50% discount at any time, the language clearly constituted use of false representations and deceptive means to collect a debt. The Court of Appeals' decision in no way prohibits a debt collector from negotiating a settlement. Under the Court of Appeals' decision, a collector may extend a settlement offer at a discount and may set a time limit for the debtor to accept the offer. The Court of Appeals' decision only prohibits a debt collector from using false representations and deceptive means in negotiating its settlement, such as

misrepresenting that the discount and time for acceptance are all that the creditor client will accept.

The Petitioner makes a rather frightening argument that somehow if courts do not ignore what it calls "technical" violations, and prohibit only the really big violations or "very abusive" violations of the FDCPA, the result will be vexatious litigation that will "improperly expand" the purpose of the FDCPA to include activity that does not "improperly threaten, abuse or cause harm." First, it is abusive for a debt collector to make false representations in collecting a debt. Second, in § 1692k Congress has provided for awards of attorney's fees and costs to allow debtors to serve as private attorneys general in policing the collection conduct of debt collectors. Litigation brought by individual debtors to address conduct by debt collectors in violation of the express language of particular provisions of the FDCPA is not vexatious; it is what Congress intended and encouraged.

To argue that the courts should look past violations of the FDCPA's express provisions and recognize as violations only conduct that the courts find "very abusive" is to invite judicial legislation of the worst kind.

The Court of Appeals applied the law to the facts and found a violation of § 1692e(10). There is no important federal question for this Court to settle, and this Court should deny the Petitioner's petition for the writ of certiorari.

CONCLUSION

This Court should deny the Petitioner's petition for the writ of certiorari in the petition.

Respectfully submitted,

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PRIORITY LETTER

PO Box 30095
Alexandria VA 22310
ADDRESS SERVICE REQUESTED

01/25/02

RE: 3002 – Capital One
Reference #: 4121741413607826
Total: $933.37

06-D264144-1-002365
Pooja Goswami
5126 Smokey River Dr
Katy, TX 77449-6017

American Collections Enterprise, Inc.
PO Box 30096
Alexandria, VA 22310-8096

***

Dear Pooja Goswami

SETTLEMENT OFFER & AMNESTY PERIOD

We are sending this letter in an attempt to clear you long and overdue account. Effectively immediately, and only during the next thirty days, will our client agree to settle your outstanding balance due with a thirty percent (30%) discount off your above balance owed.

This settlement amount must be in one payment and must be received in our office no later than 30 days

from the date of this letter unless you contact our office to make other arrangements.

Upon receipt of your approved settlement amount, our client will notify the major credit reporting bureaus that your account has been settled. Restoring credit is always a benefit to you and your creditors.

If for some reason you are not able to settle at this time, please contact our office immediately and we will discuss other reasonable payment arrangements for the full balance owed.

For your convenience, we can accept your check by phone or you may pay by Mastercard Visa, American Express or Western Union Quick Collect. ACEI will add a $25.00 check fee to all returned checks as permitted under Virginia law.

Sincerely
Tracy Jones – Ext 116
800-208-2234

This is an attempt by a debt collector to collect a debt. Any information obtained may be used for that purpose.

***